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Medco Health Solutions of Las Vegas, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, Local 675. Cases 28–CA–022914 and 28–CA–022915

August 27, 2016

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit, which has directed us to address two questions.[1] The first is whether the Respondent established special circumstances justifying its requiring an employee to remove a T-shirt bearing the slogan, "I don't need a WOW to do my job." After carefully considering the record and position statements filed by the parties, we find that the Respondent failed to establish special circumstances to justify the prohibition.

The second question is whether the Respondent's dress code, which in pertinent part prohibits clothing containing statements that are "confrontational, . . . insulting, or provocative" is unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). We find that it is.

Facts

The Respondent operated a large, highly automated pharmacy and call center located in Las Vegas, employing about 840 individuals. Its parent company operated similar facilities in other locations nationwide. The Union represented two employee bargaining units at the Las Vegas facility, one composed of pharmacists, the other of nonpharmacists. During the events at issue here, employee Michael Shore held the union position of vice chairman of the nonpharmacists unit.

Prescriptions at the pharmacy were submitted by mail or phone. They were filled by mail. Thus, employees had no in-person contact with the individual consumers submitting prescriptions, but current and potential customers toured the facility about once or twice a week. Shore testified that he never encountered visitors, but a Respondent witness testified that tour groups were sometimes taken through Shore's work area; it did not support this testimony with tour logs or testimony from the tour manager. It is undisputed, however, that tour groups visited the employee cafeteria. Overall, Shore's exposure to visitors was limited.

In June 2009, in an effort to encourage superior performance and maintain morale, the Respondent introduced what it called the "WOW program." The program featured weekly events at which employees received "WOW awards" in recognition of their achievements. WOW recipients received a lanyard and a certificate. The ceremonies—which were held during paid work time and ran 20 to 45 minutes—were led by Thomas Shanahan, the facility's vice president and general manager, and food was served. Biographical profiles of WOW recipients were posted on the Wall of WOW, a 20-foot-long display in the employee cafeteria, and broadcast over workplace monitors. Winners of multiple WOW awards earned different colored lanyards, symbolic of different levels of WOW recognition. WOW awards were not recorded in employee personnel files and were not used to determine promotions or raises. Employees were free to decline WOW awards and to refrain from attending the weekly recognition ceremonies.

The Respondent employed a full-time WOW coordinator at the Las Vegas facility and maintained a database of WOW recipients. The Respondent explained the WOW program to visitors and highlighted the Wall of WOW during tours. The Respondent's parent company started the WOW program in Las Vegas. It later implemented the program at other of its facilities. Shanahan, who started the program at the Las Vegas facility, was highly invested in the program.

Some employees, however, were unhappy with WOW and voiced their discontent, and the dissatisfaction reached beyond the Respondent's Las Vegas facility. At some point after the Respondent implemented the WOW program at other facilities, employee and union bargaining unit chairperson Melissa Osterman attended a conference for union officials from the parent company's various facilities. One of the topics of conversation was employee discontent with WOW. During that discus-

[1] On July 26, 2011, the National Labor Relations Board issued its initial Decision and Order in this proceeding, reported at 357 NLRB 170. The Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order, and the Board cross-applied for enforcement. On December 14, 2012, the court issued its decision, enforcing the Board's order in part and remanding in part. *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710 (2012).

On March 10, 2015, the Board invited the parties to file statements of position concerning the issues raised by the court's remand order. The Union and the Respondent each filed a statement. The Board has delegated its authority in this proceeding to a three-member panel.

sion, an attendee distributed shirts that the Union's Pittsburgh local had produced that bore a union logo on the front and the slogan, "I don't need a WOW to do my job," on the back. Osterman tried to obtain a shirt for each member of the Union's Las Vegas labor committee but secured only one, which she subsequently gave to Shore.

Shore wore the shirt to work on February 12, 2010. During work time, he wore an opaque navy blue lab coat over the T-shirt, completely covering its message; he left his lab coat at his work station during his lunch break, when he went to the employee cafeteria. Shore testified that several coworkers saw his shirt and expressed their approval of the slogan. Several management employees also saw the shirt and reported it to Shanahan and Michele Agnew, the facility's human resources director. Shanahan became upset, and Shanahan and Agnew called Shore and Osterman to a meeting. There, Shanahan and Agnew viewed the shirt and told Shore to remove it because it was insulting and violated the Respondent's dress code, which prohibited clothing containing statements "that are degrading, confrontational, slanderous, insulting or provocative . . . ." Shanahan, by his own account, further stated that if Shore "didn't feel he could support the programs that we offered or support the company initiatives that, you know, there were plenty of jobs out there. Maybe this [i]sn't the place for [you]." Although that day was a tour day, there is no evidence that the instruction not to wear the shirt applied only to tour days, and Agnew essentially conceded at the hearing that the prohibition was absolute. Both Osterman and Agnew testified that employees were required to wear business casual clothing on tour days, and Osterman testified that employees were permitted to wear shirts with slogans on nontour days.[2] Before the meeting ended, the Respondent allowed Shore to change into a different shirt with a union logo on it, despite the fact that a client was scheduled to tour the facility that day.

Board and Court Proceedings

The Board found, in relevant part, that the Respondent violated Section 8(a)(1) by prohibiting Shore from wearing the T-shirt referring to WOW and by maintaining a dress code that prohibited apparel bearing "confrontational, . . . insulting, or provocative" messages.

With respect to the T-shirt, the Board found that the Respondent failed to demonstrate special circumstances justifying its prohibition. The Board reasoned that the Respondent's claim that customer tours justified an absolute ban on the shirt was unavailing because the tours were not a daily occurrence; regardless of how often tours were conducted, the Board found that the Respondent did not offer any evidence that the slogan reasonably raised "the genuine possibility of harm to the customer relationship," citing *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004). The Board rejected the Respondent's argument that the nature of the T-shirt itself constituted special circumstances because it was "immediately offensive": the Board noted that the shirt was neither vulgar nor obscene and that the Respondent had offered no evidence that the wearing of the shirt threatened to disrupt discipline or production. 357 NLRB at 171 fn. 8. Accordingly, the Board found that the WOW T-shirt ban violated Section 8(a)(1) of the Act.

With respect to the dress code, the Board, applying *Lutheran Heritage Village-Livonia* 343 NLRB 646 (2004), found that it, too, violated Section 8(a)(1) because the Respondent had applied the code to restrain Section 7 activity, namely Shore's wearing of the WOW T-shirt. The Board found it unnecessary to address the judge's additional finding that employees would reasonably read the dress code to restrict Section 7 activity. Id. The Board ordered the Respondent to rescind the rule insofar as it prohibited employees from wearing clothing with messages that were provocative, insulting, or confrontational. Id. at 172.[3]

The court granted the Respondent's petition for review and denied the Board's cross-application for enforcement as to the WOW T-shirt ban and the maintenance of the dress code. The court remanded those issues to the Board, directing it to explain its rejection of the Respondent's argument that it was justified in banning the T-shirt throughout the entire workday. The court also sought clarification on the issue of a partial ban, asking why the Respondent's claim of harm to customer relations required evidence beyond a relationship between its business and the banned message. Finally, the court also directed the Board to explain its implicit ruling that the dress code terms "confrontational" and "provocative," in addition to "insulting," were overly broad.

[2] Pharmacists were required to wear lab coats only on tour days until January 1, 2010, when the Respondent unlawfully instituted a new requirement that pharmacists wear lab coats every day. 701 F.3d at 713–714.

[3] As noted above, the Board also found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain over a change that it had made to the pharmacists' dress code. The court denied review and granted enforcement of that portion of Board's order, 701 F.3d at 718, and it is no longer part of the case.

Discussion

We have considered the decision and the record in light of the court's remand order and the parties' statements of position. As explained below, we reaffirm the Board's prior findings that the Respondent failed to establish special circumstances justifying its ban of Shore's T-shirt and that the Respondent unlawfully applied the terms "insulting," "confrontational," and "provocative" from its dress code to restrict the exercise of Section 7 rights. Accordingly, we conclude that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing clothing that displayed messages protesting working conditions and by maintaining an overly broad work rule that prohibits employees from wearing clothing with messages that were "provocative," "insulting," or "confrontational," and we will issue an appropriate supplemental Order.[4]

A. The Respondent Failed To Show Special Circumstances Justifying the T-shirt Ban

AT&T, 362 NLRB No. 105 (2015), summarizes the Board's rule for determining whether an employer can justify a ban on clothing that makes reference to a union or working conditions:

> Employees generally have a protected right under Section 7 to wear union insignia, including union buttons, in the workplace. . . . This right, however, may give way when the employer demonstrates special circumstances sufficient to outweigh employees' Section 7 interests and legitimize the regulation of such insignia. . . . Special circumstances may include, inter alia, "situations where display of union insignia might 'jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.'"

Id., slip op. at 3 (citations omitted). See also *Boch Honda*, 362 NLRB No. 83, slip op. at 2–3, 11 (2015), enfd.—F.3d—(1st Cir. June 17, 2016), 2016 WL 3361733, slip op. at 9–10.

The burden is on the Respondent to prove the existence of special circumstances that would justify a restriction. See *W San Diego*, 348 NLRB 372, 373 (2006). "[T]he 'special circumstances' exception is narrow," and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid[] . . . ." *E & L Transport Co.*, 331 NLRB 640, 640 fn. 3 (2000). As explained below, we conclude that the Respondent failed to establish special circumstances justifying either a partial or total ban on Shore's WOW T-shirt.

Public Image

In asking the Board to explain why the Respondent's argument, that the message on Shore's T-shirt potentially affected the Respondent's relationship with its customers, was insufficient to establish special circumstances, the court stated that "the Respondent has provided considerable evidence that the WOW program is an important element of the pitch it gives prospective and current clients." 701 F.3d at 717. We construe the court's observation as raising the question whether the Respondent had established a public image about the WOW program that would justify its ban on anti-WOW clothing. We find that the Respondent failed to do so.

The Board has held that special circumstances exist when the wearing of union insignia may "unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994) (court finding special circumstances to exist under public image theory). The Board requires an employer to show that the message interferes with that image. *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970). See also *W San Diego*, above at 373. In *Titus Electric Contracting, Inc.*, the Board affirmed the judge's finding that the employer failed to establish special circumstances because it "did not create a public image of its employees by dressing them in some distinctive attire." 355 NLRB 1357, 1373 (2010). In *AT&T*, the Board rejected the employers' special circumstances argument, reasoning that the employers' history of allowing employees to wear a variety of nonbranded apparel undermined the argument that the ban was necessary to maintain a professional public image with customers. See 362 NLRB No. 105, above, slip op. at 4. Cf. *Bell Atlantic Pennsylvania, Inc.*, 339 NLRB 1084, 1086–1087 (2003) (Board deferred to arbitrator's determination that "Road Kill" T-shirts, depicting employees as squashed

[4] The court did not specify any particular objection to the Board's finding that the Respondent violated Sec. 8(a)(1) by inviting Shore to quit his employment in response to his protest of working conditions. It neither included that finding among those it enforced nor remanded the issue to the Board. In the absence of specific reference by the court, we will treat the issue as remanded for reconsideration. See *Allis-Chalmers Corp.*, 278 NLRB 561 (1986). The court endorsed the Board's findings that Shore's wearing of the shirt was protected concerted activity and that the WOW program constituted a condition of employment. 701 F.3d at 714–716. It follows that the Respondent's statement that, if Shore could not support the Respondent's policies, there were other jobs out there and perhaps "this wasn't the place for him" was an implied threat that violated Sec. 8(a)(1). See, e.g., *McDaniel Ford*, 322 NLRB 956, 956 fn. 1 (1997). Accordingly, we reaffirm that finding for the reasons stated in the prior decision. 357 NLRB 170, 171, 176–177.

and lying in a pool of blood, was disruptive of the employer's public image interests), affd. sub nom. *Communications Workers Local 130000 v. NLRB*, 99 Fed. Appx. 233 (D.C. Cir. 2004).

We do not dispute the court's assessment that the WOW program is an important part of the Respondent's business plan to attract and retain customers. The Respondent has not demonstrated, however, that it implemented appearance rules in order to meet this business objective. It did not, for instance, require WOW award recipients to display their lanyards and certificates on tour days, nor does its dress code make any reference to the WOW program. We find the evidence insufficient to show that Shore's T-shirt would unreasonably interfere with a public image established by the Respondent through employee appearance rules.[5]

a. Customer Relationship

The court next observed that, in *Pathmark Stores, Inc.*, 342 NLRB 378 (2004), the Board held that a grocery store could, because of its "legitimate interest in protecting its customer relationship," lawfully prohibit its employees from wearing clothing displaying the message, "Don't Cheat About the Meat!" in protest of the store's use of prepackaged meat products. The court also noted that, in *Noah's New York Bagels, Inc.*, 324 NLRB 266 (1997), the Board upheld a ban on T-shirts reading "If its [sic] not Union, its [sic] not Kosher." The court further observed that, in *Pathmark*, the employer had "presented no evidence that customers decided not to buy" its products in response to the banned slogan, but the Board nonetheless upheld the ban because it found "the slogan reasonably threatened to create concern among [the employer's] customers." 342 NLRB at 379. The court directed the Board to explain why, in the present case, the Respondent's claim of harm to customer relations requires evidence beyond what it has already adduced. 701 F.3d at 717.

Board law is clear that where, as here, an employee's protected message relates to terms and conditions of employment, not the employer's products,

> [n]either the mere possibility that the [r]espondent's employees may come into contact with a customer or supplier nor an employer's interest in avoiding controversy among its clientele that an expression of union membership or support might engender outweighs the employees' Section 7 right to wear these emblems. . . . Likewise, the pleasure or displeasure of an employer's customers does not determine the lawfulness of banning employee display of insignia.

Inland Counties Legal Services, 317 NLRB 941, 941 (1995) (citations omitted).

Stated otherwise, the Board requires more than conjecture about customers' negative reactions to employees' Section 7 activity to find special circumstances. An employer must show "that the wearing by its employees of insignia . . . adversely affected its business . . . and that, because of deleterious effects on these interests, the employer's ban on the wearing of such insignia outweighs the employees' statutory right . . . ." Id. See also *Danbury HCC*, 360 NLRB No. 118, slip op. at 2 and 2 fn. 5 (2014) ("A]n employer who presents only generalized speculation or subjective belief about potential disturbance . . . or disruption of operations fails to establish special circumstances justifying a ban on union insignia."), enfd. sub nom. *HealthBridge Management, LLC v. NLRB*, 798 F.3d 1059 (D.C. Cir. 2015).[6] The Board

[5] We reject the dissent's criticism that we have advanced an unsupported "narrow conception" of a public image. We construe the court's decision as asking us to address the question of public image specifically in regard to the WOW program. Even interpreting "public image" more broadly, however, we would find that the Respondent has failed to show a public image that would justify banning Shore's T-shirt. Employees were not required to wear uniforms and were permitted to wear a variety of nonbranded apparel, including T-shirts. There was no suggestion of vulgarity in the message on Shore's T-shirt. In these circumstances, the dress code's general references to maintaining a "professional workplace," a "neat, clean, conservative appearance," and a perception among customers that the Respondent will be "effective" are insufficient to establish a public image that would justify its ban on Shore's T-shirt.

It is the dissent's position that is unsupported, insofar as it asserts that employers may prohibit certain union apparel simply because it is conspicuous and contains a provocative or controversial message. The dissent observes that bans on such clothing were upheld in *W San Diego and Bell Atlantic,* above. In *W San Diego,* however, the Board found that the employer had created a distinctive public image through its stated business goal (a specialized "wonderland" atmosphere) and a strict uniform requirement. The Board then evaluated the size and content of the union insignia to determine whether they interfered with that image. 348 NLRB at 373. In *Bell Atlantic*, the Board considered whether to defer to an arbitration award; thus, the question was not whether the award was fully consistent with Board precedent, but whether it was palpably wrong. 339 NLRB at 1086–1087.

[6] Three other courts of appeals have expressly endorsed this approach. In *Mount Clemens General Hospital v. NLRB*, 328 F.3d 837 (6th Cir. 2003), where nurses were banned from wearing union buttons reading "FOT" with a line drawn through the letters to protest forced overtime, the Sixth Circuit affirmed the Board's rejection of the hospital's ban because the justification it offered "depend[ed] primarily on speculation about the possible effect of the buttons." Id. at 847. In *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577 (9th Cir. 2008), a case involving a ban on union buttons that read "RNs Demand Safe Staffing," the Ninth Circuit found that the Board's determination that special circumstances justified the ban was not supported by substantial evidence in the record, id. at 581, and ordered that the administrative law judge's Decision and Order finding the ban unlawful be reinstated.

"does not require actual harm or a disturbance . . . in order to establish special circumstances. What we require[] . . . is specific evidence, not . . . general and speculative testimony . . . ." Id., slip op. at 3.[7] Thus, the Respondent has the burden of adducing nonspeculative evidence that Shore's shirt adversely affected its business and that, because of deleterious effects on those interests, its ban on the wearing of such clothing outweighed Shore's statutory right.

The special circumstances test reflects a balancing of the employer's interests and the employees' Section 7 rights. "The Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products . . . ." *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. at 4 (2014). See also *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252–1253 (2007) (discussing distinction between disparagement of products and communications related to labor disputes), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). Employers have no such legitimate interest in preventing employees' discussion of their terms and conditions of employment.[8] Accordingly, it is reasonable for the Board to treat the two kinds of cases differently and to require more proof from an employer who seeks to restrain employee speech concerning working conditions.

When employees' apparel communicates disparaging messages to consumers about an employer's products, as in *Pathmark Stores* or *Noah's New York Bagels*, the potential harm to the employer's customer relationships is self-evident; nonspeculative evidence of harm is unnecessary. But when employees' apparel communicates messages about terms and conditions of employment, we will not so readily infer a negative impact on customer relationships. Without evidence to support an employer's claim that its customer relationships are adversely affected by employees' display of union insignia, an employer's claim that customers might respond negatively amounts to little more than an expression of the employer's antiunion sentiments.[9] We therefore reject the dissent's characterization of the special circumstances test as an amorphous standard permitting employers to ban Section 7-related messages when they "inherently pose potential harm" or have an "inherent tendency . . . to undermine the employer interest at stake." The Board has never articulated the standard in that manner, and it is fundamentally inconsistent with placing the burden on the Respondent to show special circumstances that outweigh employees' Section 7 rights.

For these reasons, when employees' apparel addresses terms and conditions of employment,[10] we require the employer to show that the apparel adversely affected or would adversely affect its business and that, because of the deleterious effects, its ban on the wearing of such clothing outweighs the employees' statutory right. We find that the Respondent failed to meet that burden. In *Inland Counties Legal Services*, the Board found that the employer failed to carry its burden even though the employer showed that the employee wearing a union button

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Id. at 585. The court rejected "the broad proposition that any testimony by a[n] . . . administrator about potential harm to [customers] . . . is entitled to deference and is therefore sufficient to establish special circumstances." Id. at 584. The court noted that there was no evidence showing that any patients had asked questions about the button's message, let alone patient complaints, and noted that "[e]vidence of what actually occurred is far more telling than unsubstantiated conjecture about what might occur." Id. Most recently, in *Boch Honda v. NLRB*,—F.3d—(1st Cir. June 17, 2016), 2016 WL 3361733, the First Circuit enforced the Board's finding that the employer failed to establish special circumstances justifying a total ban on union insignia due to the "comparative weakness" of the employer's showing, slip op. at 11, noting in particular that the employer provided "no evidence" in support of its assertion that the ban was motivated by safety concerns. Slip op. at 35. In *HealthBridge Management, LLC v. NLRB*, quoted above in text, the D.C. Circuit stated that the Board "reasonably found" that the employer's testimony of patient disturbance caused by stickers that read, "BUSTED By National Labor Board For Violating Federal Labor Law," "was speculative and conjectural." 798 F.3d at 1071.

Mount Clemens, *Washington State Nurses Association*, and *HealthBridge*, unlike the present case, involved healthcare facilities, for which the Board has recognized additional considerations to address concerns about disruption of patient care. In nonpatient care areas, restrictions on wearing insignia are presumptively invalid in accordance with the basic rule, and it is the employer's burden to establish special circumstances justifying its action. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979); accord *St. John's Hospital*, 222 NLRB 1150, 1150–1151 (1976). By contrast, restrictions on wearing insignia in immediate patient care areas are presumptively *valid*. See *Baptist Hospital*, above. But applying that more restrictive standard, the courts in those three cases found that the employers failed to meet their burden.

[7] The dissent's attempt to distinguish *Danbury HCC* fails. That case, like *Inland Counties Legal Services*, concerned union messages directed at terms and conditions of employment, rather than the employer's products. The only analogy made to product-disparagement cases such as *Pathmark Stores* in *Danbury HCC* was offered by our colleague, in his dissent. 360 NLRB No. 118, slip op. at 5 (Member Miscimarra, dissenting).

[8] The standard upon which we rely, which our dissenting colleague mischaracterizes as "new," is the same test that the Board has always applied to union insignia cases in which the Respondent raises a claim of special circumstances. The Board's standard is grounded in longstanding precedent, and has the approval of several courts of appeals, including the District of Columbia Circuit.

[9] See *Pathmark*, supra at 380 fn. 5 ("This is not a case, then, in which an employer's claim of disruption is based on the contention that customers might simply be displeased by or opposed to protected union activity.").

[10] In this case, the court affirmed the Board's finding that the WOW program was a condition of employment. 710 F.3d at 716.

had some client contact and that, on occasion, a prospective client had a complaint against a labor organization. The Board rejected "the speculation . . . that the button's message might make a negative impression on clients," noting that "the [r]espondent provides no basis for inferring that a union button would prejudice its interests or the interests of its clients. . . . [T]he mere possibility of such offense does not outweigh the employees' right to wear such items." Id. at 942. In the present case, the Respondent has provided even less support for its argument, as it has failed to establish either that Shore had more than fleeting client contact or that any customer complained or expressed concern about employees' attitudes towards the WOW program.[11] Indeed, the Respondent's evidence amounts to little more than that the facility's general manager regarded the T-shirt as disparaging a morale-boosting program that he had had a significant role in implementing.[12]

In *St. Luke's Hospital*, 314 NLRB 434 (1994), the Board found no special circumstances to justify a ban on "United to Fight for Our Health Plan" buttons and stickers where there was no evidence that any patient complained of, or even noticed, the message. In *Danbury HCC*, the Board rejected a special circumstances defense that was based on speculative testimony about the effect on patients of a sticker that publicized the Board's issuance of a complaint against the employer. Above, slip op. at 2. More recently, in *AT&T*, the Board found that "the [r]espondent has presented nothing beyond conclusory testimony to support its argument that . . . it was concerned about potentially offending customers when it prohibited employees from wearing the buttons. The Respondent's speculative, conclusory testimony is not sufficient to meet its burden of demonstrating special circumstances . . . ." Slip op. at 5. The Respondent's claim that customers might have negative reactions to employee apparel bearing a protected message is no less speculative than the evidence in *AT&T*, *Danbury HCC*, and *St. Luke's Hospital* and compels the same conclusion.[13]

Absent proof that Shore's protest concerning his working conditions adversely affected or would adversely affect the Respondent's business relationships, we cannot conclude that the Respondent's ban on the wearing of clothing bearing protected concerted messages outweighed Shore's statutory right to do so.[14] Thus, we find that the Respondent failed to establish special circumstances justifying its ban on Shore's T-shirt.

b. Total Ban

Even if the Respondent had shown that protection of the reputation of its WOW program constituted special

[11] In maintaining that "tours included the area where Shore worked" and that Shore "had substantial contact with customers," the dissent argues that, even if employees did not see any tour groups, it is possible that tour groups saw them. We find this argument unpersuasive. First, the Respondent did not refute the testimony that Shore did not encounter visitors and that employees had advance notice of tours. Second, it is undisputed that Shore wore a dark blue lab coat when he was in his work area. Thus, even if he were unwittingly seen in his work area by participants on unscheduled tours, his T-shirt would not have been visible to them.

[12] Respondent officials Shanahan and Agnew testified that the Respondent instituted the ban on the T-shirt not because of potential visitor exposure to it but because it was insulting to them. The court similarly characterized Shore's T-shirt as a "gibe at Medco's management." *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, above, 701 F.3d at 717. Managers' personal displeasure with a protected message, however, is not a special circumstance. *Midstate Telephone Corp.*, 262 NLRB 1291, 1292 (1982), enf. denied in relevant part 706 F.2d 401, 403–404 (2d Cir. 1983) (court found that special circumstances existed on other grounds).

The dissent contends that the T-shirt undermines the Respondent's representations to its customers because it conveys that the WOW program does not improve service and suggests that the wearer does not intend to provide exceptional service. To the contrary, the message on the T-shirt indicates that employees do not need such incentives to perform their jobs well and was intended to critique what employees perceived as a waste of the Respondent's resources on this particular program.

[13] We reject the dissent's characterization of our assessment of the record as "offhanded[ly]" dismissing "considerable evidence" that the WOW program is an important element of the Respondent's pitch to prospective and current clients. To the contrary, we do not challenge the court's assessment that the Respondent highlighted the WOW program to visitors. It does not automatically follow, however, that the Respondent is then privileged to ban any protected concerted criticism of the WOW program, without offering evidence beyond mere speculation about the impact that criticism of the WOW program has on customer relationships.

Turning to the court's comment that, "[e]specially for a firm selling a *service*, concern for customers' appraisal of its employees' attitudes seems natural," 701 F.3d at 717, *AT&T*, *Danbury HCC*, *St. Luke's*, and *Inland Counties Legal Services* all involved employers providing services rather than products, so these cases cannot be distinguished on that basis.

[14] Our colleague cites *Leiser Construction, LLC*, 349 NLRB 413 (2007), and *Komatsu America Corp.*, 342 NLRB 649 (2004), to support his argument that the Board does not require actual proof of harm to establish special circumstances. But our decision does not require the Respondent to prove actual harm. What the Board does require, however, is specific evidence and not just mere speculation that the T-shirt would or would be likely to harm the Respondent's business relationships. *Danbury HCC*, above, slip op. at 2. *Leiser* and *Komatsu* demonstrate that this standard is not, as the dissent contends, "a per se rule that special circumstances do not exist when the message at issue concerns terms and conditions of employment." *Leiser* involved a sticker of someone urinating on a rat, which was "unquestionably vulgar and obscene." 349 NLRB at 415. The message on the T-shirt in *Komatsu* was a "clear appeal to ethnic prejudices." 342 NLRB at 650. Shore's T-shirt, of course, was neither.

circumstances, we would nonetheless find that it violated the Act because it failed to demonstrate the necessity of the total ban on Shore's T-shirt. In analyzing the validity of a total ban, the Board examines whether and to what extent employees subject to the ban interact with the public. See, e.g., *W San Diego*, above at 372; *Pathmark Stores*, above at 379 and 379 fn. 3 (emphasizing that slogan was visible to customers and distinguishing cases in which employees had little or no customer contact). See also *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003) (no special circumstances where ban on union button applied to facility with no customer contact); *Caterpillar, Inc.*, 322 NLRB 690, 690–691, 693 (1996) (affirming judge's finding that there were no special circumstances justifying ban where "there is no showing that . . . customers tour this facility"). The Board has held that, when employees have limited contact with clients, "the mere possibility" that the employees may come into contact with a customer does not outweigh the employees' Section 7 right to wear emblems. *Escanaba Paper Co.*, 314 NLRB 732, 733 fns. 5 and 7 (1994), enfd. sub nom. *NLRB v. Mead Corp.*, *73* F.3d 74 (6th Cir. 1996). Cf. *Midstate Telephone Corp*., above, enf. denied 706 F.2d 401, 404 (2d Cir. 1983) (court reversed Board's finding of violation in part because employees had significant contact with public). As discussed above, Shore's contact with visitors was, at most, fleeting.[15] On this basis alone, the above-cited cases strongly suggest that the total ban was unlawful.

In its decision remanding this case to the Board, the court found significant the Respondent's managers' testimony that unscheduled tours occurred periodically, and visitors sometimes entered the facility without advance notice, which, the court suggests, might warrant a total ban. We find, however, that the Respondent failed to prove that employees lacked advance notice of tours.[16] Thus, the purported reason for the total ban—to prevent customer exposure to anti-WOW messages during unscheduled visits—lacks a factual basis. Even if we credited the managers' testimony on this point, "a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule . . . ." *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015). In *W San Diego*, the Board rejected an argument that a partial ban limited to public areas would be impractical, noting that the employer "introduced no actual record evidence to support this assertion of impracticality. Nor do we believe that the Respondent has demonstrated even a reasonable concern that would justify a property-wide ban . . . ." Id. at 374. Here, as the judge noted, the asserted necessity of the total ban is undermined by the fact that the Respondent has formulated other dress code policies that apply only when customers may be present at the facility. Accordingly, even if the Respondent had established that the protection of the reputation of its WOW program constituted special circumstances, we would find the total ban unlawful because the Respondent failed to establish either that employees lacked advance notice of tours or that a partial ban would be impractical even if there were unscheduled tours.

For all of the above reasons, we find that the Respondent's total ban on Shore's T-shirt was unlawful.

B. Respondent's Dress Code Was Applied against Section 7 Activity

The Respondent's dress code prohibited, among other things, apparel containing "confrontational," "insulting," or "provocative" statements. The court directed the Board to provide an explanation for its "implicit ruling that each of the three adjectives was overbroad" and for its order that the Respondent rescind the rule. 701 F.3d at 717–718.

Under *Lutheran Heritage*, a work rule is unlawful if it explicitly restricts activities protected by Section 7 activity, or if there is a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule or policy was promulgated in response to Section 7 activity; or (3) the rule or policy has been applied to restrict the exercise of Section 7 rights. Id. at 646–647. We find that the terms "confrontational," "insulting," and "provocative" were applied to prohibit Section 7 activity, and the Respondent's maintenance of the rule was therefore unlawful. Like the prior Board, we find it unnecessary to pass on the judge's additional finding that employees would reasonably construe those terms to prohibit Section 7 activity.[17]

[15] The dissent's contrary finding is based on unsubstantiated assumptions about the facts, including an unsupported assumption that Shore had substantial contact with customers.

[16] The judge did not credit or discredit the managers' testimony. Employees Shore, Osterman, and Webb all testified that they received advance notice of tours, thus contradicting the managers' testimony. The Respondent did not submit additional evidence, such as building or tour logs or testimony from the tour manager, that could have resolved the testimonial conflict.

[17] Because we do not address that question, we have no occasion to consider the first prong of the *Lutheran Heritage* test, set forth above. The dissent, however, does address it, seemingly for the purpose of reiterating his disagreement with it, which he set forth in his dissent in *William Beaumont Hospital*, 363 NLRB No. 162 (2016). For the reasons stated in the majority opinion in that decision, we reject his view.

Employee Shore and Managers Agnew and Shanahan testified that Shanahan and Agnew instructed Shore to remove the shirt because they were "disappointed," "hurt," and "upset" by it and thought it was "insulting," "inappropriate for the workplace," and "offensive." Elsewhere in his testimony, Shanahan defined the rule's use of "confrontational" as "offensive." Thus, the record supports the finding that the Respondent applied the terms "insulting" and "confrontational" to prohibit Shore's shirt. And, in its position statement submitted to the Board after the remand, the Respondent concedes that it applied the ban on "confrontational," "insulting," and "provocative" clothing to Shore's shirt. Based on the testimony and the Respondent's additional admission, we conclude that the Respondent's rule prohibiting clothing that is "confrontational," "insulting," and "provocative" was applied to restrict the exercise of Section 7 rights. The Respondent therefore violated the Act by maintaining the rule, and we shall order that the rule be rescinded or revised. *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 4 (2014).[18]

CONCLUSIONS OF LAW

The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by

(a) Prohibiting employees from wearing clothing that displays messages that protest working conditions.

(b) Inviting employees to quit their employment in response to their protest of working conditions.

(c) Maintaining and enforcing overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully maintained and enforced overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational, we shall order the Respondent to rescind or revise the unlawful rules and notify its employees in writing that it has done so.

Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), the Respondent may comply with the Order by rescinding the unlawful provision and republishing its employee handbook without it. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with a handbook insert stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing that will cover the unlawfully broad rule, until it republishes the handbook either without the unlawful provision or with a lawfully-worded rule in its stead. Any copies of the handbook that are printed with the unlawful rule must include the insert before being distributed to employees. See *2 Sisters Food Group*, 357 NLRB 1816, 1823 fn. 32 (2011); *Guardsmark*, above at 812 fn. 8.

ORDER

The Respondent, Medco Health Solutions of Las Vegas, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing clothing that displays messages that protest working conditions.

(b) Inviting employees to quit their employment in response to their protest of working conditions.

(c) Maintaining overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational, and notify employees in writing that it has done so.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the attached

[18] The dissent relies on *Marina Del Rey Hospital*, 363 NLRB No. 22 (2015), to support his argument that rescission is improper where, as here, the Board finds that a rule was unlawfully applied. But, as the dissent acknowledges, the violation in *Marina Del Rey Hospital* involved disparate application of an off-duty access rule. Off-duty access rules are analyzed under the principles set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976). That framework is analytically distinct from the *Lutheran Heritage* test, which we apply here. For violations under the *Lutheran Heritage* test, the Board's standard remedy includes rescission. See, e.g., *AWG Ambassador, LLC*, 363 NLRB No. 137, slip op. at 2 (2016); *Hitachi Capital America Corp.*, 361 NLRB No. 19, slip op. at 3 (2014).

notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

The Respondent implemented a "WOW" employee recognition program in 2009 to encourage superior performance, and the Respondent relied heavily on the WOW program's existence to promote its business to customers and to emphasize the commitment of Medco (and its employees) to customer service. Many of Medco's customers participated in customer tours of Medco's facility, which occurred regularly. Employee Michael Shore, who was also the Union vice-chairman, was not an enthusiastic supporter of the WOW program, and he demonstrated his lack of enthusiasm by wearing a T-shirt bearing the union logo and (on the back) the message, "I don't need a WOW to do my job." In an effort to protect its image and reputation, the Respondent requested that Shore remove the shirt, citing a provision of its dress code banning "degrading, confrontational, slanderous, insulting or provocative" statements.

Among other violations, the Board found that Medco's requirement that Shore remove the T-shirt, and its application of its dress code to the shirt, both unlawfully interfered with protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act). The United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's decision on both points and remanded the case to the Board. On remand, my colleagues conclude again that the Respondent engaged in the same violations identified by the Board previously. For the reasons that follow, I believe the D.C. Circuit properly found that the Board's prior rulings, as described above, were deficient, and I believe the record does not support a finding that the Respondent violated Section 8(a)(1) in these regards. Accordingly, I respectfully dissent.

Facts

The Respondent operates a mail order pharmacy that fills prescriptions and mails completed orders to patients. In the summer of 2009, the Respondent introduced its "WOW" employee recognition program for the purpose of encouraging superior performance. Under this program, employees received "WOW" awards at weekly events in recognition of their achievements. Recipients received a lanyard and a certificate at a ceremony led by Respondent's vice-president and general manager Thomas Shanahan, and their biographical profiles were posted on a "Wall of WOW" in the employee cafeteria.

The Respondent's customers are the businesses that use Medco to meet the pharmacy needs of their insured workers. To promote its business, the Respondent schedules approximately 100 customer tours of its facility each year, approximately two a week. During these tours, the Respondent underscores its commitment to serving its customers by showing the visiting customer representatives its "Wall of WOW" and featuring the WOW program in a slide presentation it regularly shows during the tours.

On February 12, 2010, representatives of Land O'Lakes, a Medco client, were scheduled to tour the facility. That same day, Shore wore to work a T-shirt that had the Union's logo on the front and on the back the

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

message "I don't need a WOW to do my job." Upon learning of the shirt, Shanahan requested that Shore remove it because it violated the Respondent's dress code. Shanahan added that if Shore "didn't feel he could support the programs that we offered or support the company initiatives that, you know, there were plenty of jobs out there. Maybe this wasn't the place for him." In the course of this conversation, the Respondent allowed Shore to change into a different shirt that, like the disputed shirt, bore the Union's logo but that did not include the anti-WOW message.

Prior Proceedings

The Board previously found, in relevant part, that the Respondent violated Section 8(a)(1) by requiring Shore to remove the anti-WOW T-shirt and unlawfully maintained an overly broad work rule by applying its dress code to restrain Section 7 activity. See *Medco Health Solutions of Las Vegas, Inc.,* 357 NLRB 170 (2011). As noted above, the D.C. Circuit refused to enforce either finding.[1] With regard to the T-shirt violation, the court held that the Board had failed to provide a reasoned explanation for its conclusion that the T-shirt did not pose a real risk of harm to its customer relationships. The court found that "Medco has provided considerable evidence that the WOW program is an important element of the pitch it gives prospective and current clients." Observing that the Board had previously allowed a grocery store to ban clothing bearing the message "Don't Cheat About the Meat!"[2] and allowed a bagel store to ban T-shirts reading "If its [sic] not Union its [sic] not Kosher"[3]—in each case without any proof that the message harmed the employer's business—the court held that the Board had not adequately explained why the Respondent was required to do more to sustain its ban. With regard to the dress code, the court held that the Board had offered no explanation for its "implicit ruling" that the policy was overbroad—a determination that the court appears to have understandably viewed as an essential prerequisite for the Board's order requiring the Respondent to rescind the policy.[4]

Discussion

I. The Anti-WOW T-Shirt

Employees generally have a protected right under Section 7 to wear union insignia, including union T-shirts, in the workplace. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945); *P.S.K. Supermarkets,* 349 NLRB 34, 35 (2007). This right, however, may give way when the employer demonstrates special circumstances sufficient to outweigh employees' Section 7 interests and legitimize the regulation of such insignia. See *Komatsu America Corp.,* 342 NLRB 649, 650 (2004). The Board has previously found such special circumstances justifying the proscription of union slogans or apparel when their display "may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." Id.

Applying these principles, I believe that the Respondent has demonstrated special circumstances justifying its prohibition of the anti-WOW T-shirt. First, it is undisputed that the Respondent's customers frequently toured its facility. As discussed below, those tours included the area where Shore worked. Second, it is also undisputed that the WOW program is an important part of the pitch the Respondent gives prospective and current clients. Shanahan testified without contradiction that the program is important to the Respondent, and this testimony is confirmed by the fact that the Respondent assigned a full-time employee to manage it. The WOW program reflects the Respondent's commitment to exceptional service, a point the Respondent makes by insuring that its customers see the "Wall of WOW" and learn about the WOW program during their tours. Third, I believe that the T-shirt, which the court aptly characterized as a "gibe at Medco's management" and an expression of "sullen resentment," undermined that message. *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* above, 701 F.3d at 717. It conveys that the WOW program does not improve service, contrary to the Respondent's representa-

[1] See *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* 701 F.3d 710 (D.C. Cir. 2012). The court did enforce certain other findings, which are not at issue here.

[2] *Pathmark Stores, Inc.,* 342 NLRB 378 (2004).

[3] *Noah's New York Bagels, Inc.,* 324 NLRB 266, 275 (1997).

[4] The Board also found in its prior decision that the Respondent violated Sec. 8(a)(1) by telling Shore that if he did not feel he could support the WOW program there were other jobs out there and "maybe this wasn't the place for him." The court of appeals noted this finding in its opinion but did not enforce or specifically remand it. I join my colleagues in treating the issue as remanded. See *Noel Canning v. NLRB,* 823 F.3d 76, 80 (D.C. Cir. 2016) (court's mandate should be interpreted reasonably and not in a manner to do injustice). On the merits, I concur in finding that the statement violated the Act. The court found that Shore's opposition to the WOW program was concerted activity protected by Sec. 7 of the Act and that finding is now the law of the case. For the reasons stated herein, I believe that the Respondent acted lawfully in requesting that Shore remove the disputed T-shirt. But Shore had a Sec. 7 right to oppose the WOW program by other methods that did not implicate the same public image and customer relations concerns presented by the T-shirt. It necessarily follows that Shanahan's implicit threat of reprisal if Shore did not abandon his opposition to the WOW program and instead "support" it violated Sec. 8(a)(1).

tions to its customers. The T-shirt's indication that the wearer does not need a "WOW" to "do my job" also suggests that the wearer intends to do no more than the basic requirements of his or her job, rather than provide the exceptional service that the Respondent promises and that its customers seek.

The Board has consistently recognized that some union messages inherently pose potential harm to an employer's public image, customer relations, or harmonious employee-management relations sufficient to justify employer prohibition. See *Pathmark Stores, Inc.,* above (grocery store lawfully prohibited clothing displaying the message "Don't Cheat About the Meat!"); *Noah's New York Bagels, Inc.,* above (employer lawfully banned T-shirts reading "If its [sic] not Union, its [sic] not Kosher."); *Komatsu America Corp.,* above, 342 NLRB at 650 (Japan-based employer lawfully prohibited T-shirt reading "December 7, 1941" on the front and "History Repeats Negotiate Not Intimidate" on the back). The Board did not require the employers in these cases to provide evidence that the display of the message had actually harmed its interests before upholding the message's prohibition. Instead, the Board found the ban lawful based on the inherent tendency of the message to undermine the employer interest at stake. See, e.g., *Pathmark,* above at 379 (employer established legitimate interest in protecting its customer relationship based on "the particular slogan involved and its reasonably likely effect on customers"). I believe the same tendency is present here for the reasons stated above.

In today's decision, the majority still finds that the Respondent's evidence was insufficient to justify prohibiting the T-shirt. They conclude that the ban was unnecessary to protect the Respondent's public image, on the grounds that the Respondent has not demonstrated that it implemented appearance rules in order to attract and retain customers. The majority also finds no cognizable impact on customer relations, reasoning that where employee apparel communicates a message about terms and conditions of employment, as opposed to the employer's products, the employer bears a different and evidently heavier burden of proof to show an adverse effect from the apparel. Under the majority's new standard, insignia or apparel bearing a message regarding working conditions cannot be prohibited unless the employer provides specific evidence, *apart from the message itself*, that it adversely affected or would adversely affect the employer's business. Finally, my colleagues reason that in any event the Respondent's ban on the anti-WOW T-shirt was not limited to times when customers were present, and that Shore's contact with customers was too "fleeting" to justify a total ban on the shirt.

I respectfully disagree with my colleagues' analysis, and their conclusions, for several reasons.

First, the Respondent banned the T-shirt pursuant to its dress code, which prohibits "insulting," "confrontational," or "provocative" clothing. Indeed, in today's decision, the majority finds that the Respondent violated the Act by applying its dress code in this manner. That dress code specifically states that it was promulgated with customer perceptions in mind in order to encourage businesses to use its services.[5] Accordingly, there is no support for the majority's finding that the Respondent has not shown that it "implemented appearance rules" for the purpose of meeting the "business objective" of attracting and retaining customers. To the extent that the majority contends that the Respondent could not rely on its dress code absent proof that it was implemented specifically with the WOW program in mind, the Board has never imposed this heightened burden on any other employer and there is no valid justification for doing so here.[6] By

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[5] The dress code states, in relevant part:

> One of the primary objectives of this business is to create and maintain a professional workplace. Dress can influence business results in two ways —
>
> (1) Our dress creates a perception by customers and potential customers as to how effective we will be in handling their business. In addition to seeing the technologies employed in our facility, customers get a visual snapshot of the employees. Neat, clean, conservative dress typically leaves a positive impression. Customers with a positive impression are more likely to either start doing business with us or continue to do business with us. Both of these events have a positive impact on business results.
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> ***

[6] None of the cases cited by the majority support the narrow conception of an employer's public image that the majority advances. Nor do any of those cases actually support the majority's position that the T-shirt at issue in this case did not undermine the Respondent's public image. *United Parcel Service,* 312 NLRB 596 (1993) (employer unlawfully prohibited its uniformed delivery drivers from wearing dime-sized pins bearing the union logo and an abbreviation of the union's name), enf. denied 41 F.3d 1068 (6th Cir. 1994) and *Titus Electric Contracting, Inc.,* 355 NLRB 1357, 1373 (2010) (construction company unlawfully prohibited T-shirts bearing a union logo where the employer did not require employees to wear standardized clothing and unlawfully modified its dress code to prohibit the union T-shirt one day after an employee wore one to a jobsite), are plainly distinguishable, as those cases involved union apparel that was either inconspicuous, bore only the union's logo with no additional provocative message or language, or both. In contrast, the Board found lawful prohibitions on union apparel that, like the anti-WOW T-shirt, was conspicuous and did bear a provocative or controversial message in *W San Diego,* 348 NLRB 372 (2006) (employer lawfully prohibited uniformed hotel employees from wearing, in public areas of the hotel, 2-inch union buttons reading "Justice Now! Justicia Ahora!") and *Bell Atlantic Pennsylvania, Inc.,* 339 NLRB 1084 (2003) (deferring to arbitrator's determination that employer lawfully prohibited T-shirt depicting employees as "Road Kill"), affd. sub nom. *Communications Workers Local 130000 v. NLRB,* 99 Fed. Appx. 233 (D.C. Cir. 2004). These prohibitions were upheld without any indication in either case that the employer's dress

violating the Respondent's dress code, the anti-WOW T-shirt plainly undermined the public image the Respondent sought to present. The majority fails to support their belief that the Respondent was required to do more to justify the ban.

Second, the majority also errs in finding that the Respondent's evidence was insufficient to establish that the T-shirt threatened cognizable harm to its customer relationships. Regardless of whether union apparel addresses terms and conditions of employment or an employer's products, the Respondent's burden of proof is the same:

> Special circumstances exist if an employer can show by *substantial evidence* that the wearing by its employees of insignia for a union adversely affected its business or was necessary to maintain employee discipline and that, because of deleterious effects on these interests, the employer's ban on the wearing of such insignia outweighs the employees' statutory right to do so.

Inland Counties Legal Services, 317 NLRB 941 (1995) (emphasis added).[7] My colleagues may wish that a different, and stricter, standard applied, but our precedent does not support their position.[8] The majority also errs insofar as they hold that, under their newly-fashioned standard, cognizable harm to customer relations can never be established solely from the content of the message itself where the message concerns terms and conditions of employment. To the contrary, in *Leiser Construction, LLC,* above, the Board found that the employer lawfully prohibited an employee sticker that showed someone urinating on a "nonunion" rat based solely on the vulgar and obscene nature of the sticker and the fact that, as in this case, the employer allowed other (non-obscene) union-related insignia. Similarly, in *Komatsu America Corp.,* above, the Board found that a T-shirt protesting a Japan-based employer's outsourcing plans as another "Pearl Harbor" could be banned based on the inherent impact of its message, absent any proof of actual harm. The majority's insistence that the Respondent was required to do more on the theory that the anti-WOW T-shirt did not disparage the Respondent's products cannot be reconciled with this precedent.[9]

Instead, the majority's new standard tracks the *Komatsu* dissent, which contended, like the majority here, that the "Pearl Harbor" T-shirt at issue in that case could not be banned absent specific evidence (besides its text) that wearing it might exacerbate employee dissension or interfere with the employer's public image. The *Komatsu* dissent, like the majority here, specifically relied on the fact that the shirts "did not denigrate the Respondent's products or its business" as support for the position that they could not lawfully be banned. *Komatsu,* above, 342 NLRB at 653 (dissenting opinion). The majority provides no valid justification for their view that the position advanced by the *Komatsu* dissent somehow represents extant Board law.[10]

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code was promulgated specifically to address the issue raised by the employees.

Boch Honda, 362 NLRB No. 83, slip op. at 2–3, 11 (2015), enfd.—F.3d—(1st Cir. June 17, 2016), 2016 WL 3361733, slip op. at 10, cited by the majority, is also inapposite. There, a car dealer prohibited all employees who had contact with the public from wearing any button, pin, insignia, or any other "message apparel." The Board found this prohibition unlawful, rejecting the employer's claim that any such apparel would necessarily interfere with its public image. This case, in contrast, involves a ban limited to "a particular piece of attire with a particular message," a distinction the First Circuit expressly recognized in its opinion enforcing the Board's decision.

[7] See also *Leiser Construction, LLC,* 349 NLRB 413 (2007) ("In cases in which the employer *argues* that special circumstances justify a ban on union insignia, the Board and courts balance the employee's right to engage in union activities against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances.") (emphasis added), rev. denied 281 Fed. Appx. 781 (10th Cir. 2008).

[8] In *Danbury HCC,* 360 NLRB No. 118, slip op. at 2 fn. 5 (2014), enfd. sub nom. *HealthBridge Management, LLC v. NLRB,* 798 F.3d 1059 (D.C. Cir. 2015), where I relevantly dissented, the Board found that a nursing home unlawfully prohibited employees from wearing 2 1/2 inch round stickers that read "HealthBridge Danbury Health Care Center. BUSTED. March 21, 2001 By National Labor Board For Violating Federal Labor Law." The case provides no support for the majority's position. The Board's analysis did not mention or rely in any way on the fact that the stickers did not address the employer's product or services, much less impose a higher burden of proof on the basis of that purported distinction. Moreover, the panel majority found that no evidence in that case—including the text of the stickers themselves—supported the employer's stated concern that residents would conclude from the stickers that the home was being closed or that the employer had committed a crime. As shown, that is not the case here.

[9] It is not clear from the majority's opinion exactly what additional evidence the Respondent could provide that would meet their exacting standards. My colleagues concede, as they must, that an employer is not required to present evidence of actual harm. But what other evidence would they accept? The text of the message is insufficient, that much is clear from the majority opinion. Testimony that customers would respond negatively also would not suffice, as my colleagues dismiss such evidence as "little more than an expression of the employer's antiunion sentiments." Absent some indication of evidence that the majority would accept, the burden of proof they impose appears to approach the status of a per se rule that special circumstances do not exist when the message at issue concerns terms and conditions of employment.

[10] As in *Pathmark,* this is not a case in which "an employer's claim of disruption is based on the contention that customers might simply be displeased by or opposed to protected union activity." 342 NLRB at 380 fn. 5. Compare *Howard Johnson Motor Lodge,* 261 NLRB 866, 868 fn. 6 (1992), enfd. 702 F.2d 1 (1st Cir. 1983) (employer unlawfully banned all union insignia based on claim some customers might not patronize unionized hotel). As noted, the Respondent relied on "the

The majority's failure to apply settled Board law is particularly regrettable in this case, where the court of appeals has already had occasion to question the Board's adherence to its precedent. See *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* above, 701 F.3d at 717 (Board failed to adequately explain "why Medco's claim of harm to customer relations requires evidence beyond what it has already adduced, while those of the employers in *Pathmark* and *Noah's New York Bagels* required none"). As shown above, an employer does *not* bear a heavier burden in banning clothing that protests working conditions, and such a ban *can be and has been* upheld based solely on the self-evident negative impact of the message, regardless of whether the message concerns the employer's products or working conditions. *Pathmark Stores, Inc.,* above; *Noah's New York Bagels, Inc.,* above; *Leiser Construction, LLC,* above; *Komatsu America Corp,* above. Rather than apply this precedent, the majority doubles down on the same error that led to the remand in the first place.

Third, I believe the majority engages in analysis that has already been rejected by the court of appeals in its own assessment of the evidence presented in this case. And I agree with the court of appeals. As noted above, the court has already found that "Medco has provided considerable evidence that the WOW program is an important element of the pitch it gives prospective and current clients." *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* above, 701 F.3d at 717. The court also stated that this evidence would "seem to preclude an offhand dismissal of the contention that the T-shirt would threaten to damage Medco's relationship with its customers." Id. The majority, however, directly contradicts the court when they offhandedly dismiss the Respondent's "considerable evidence" as "little more than that the facility's general manager regarded the T-shirt as disparaging a morale-boosting program that he had a significant role in implementing." Having accepted the court's remand, I believe that the court's assessment of the evidence is due more respect than this.

Fourth, I believe that the majority also errs in their analysis of whether a total ban on the anti-WOW T-shirt was lawful. I agree with my colleagues that the Respondent effectively banned the shirt at all times, and that such a ban would be unlawful if employees had such limited contact with customers that there was only a "mere possibility" that the employees would come in contact with a customer. *Escanaba Paper Co.,* 314 NLRB 732, 733 fn. 5 (1994), enfd. sub nom. *NLRB v. Mead Corp.,* 73 F.3d 74 (6th Cir. 1996). But I disagree with the majority's finding that Shore's customer contact was "at most, fleeting." That finding is based on Shore's testimony that he "never saw" visitors. The important inquiry, however, is not whether Shore saw any tour groups but *whether they saw him*. I believe Shanahan's testimony that tour groups were sometimes taken through his work area is more probative on this point. Likewise, I believe my colleagues err when they find that employees had advance notice of tours sufficient that a partial ban limited to times when customers were present would be feasible. This finding, once again, is based on the testimony of employees, including Shore, that they had advance notice of tours. Because the employees could only testify regarding tours they knew about, I do not believe that their testimony, even taken at face value, contradicts the testimony of Shanahan and human resources director Michele Agnew that unscheduled tours did occur. In sum, the Respondent's employees, including Shore, had substantial contact with customers, who toured the facility approximately twice a week. Cases where employees had no or only minimal contact with customers are thus plainly distinguishable.[11]

II. THE DRESS CODE

Because my colleagues find that the Respondent, in reliance on its dress code, unlawfully prohibited Shore from wearing the anti-WOW T-shirt, they also find the dress code itself was unlawful *as applied* in this situation. Because I find that the Respondent *lawfully* prohibited the anti-WOW T-shirt, it follows that I would also dismiss the complaint allegation that the Respondent unlawfully applied its dress code to prohibit the shirt.[12]

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genuine possibility of harm to the customer relationship" posed by the specific anti-WOW message, *Pathmark,* above, 342 NLRB at 379, and has never sought to justify its action by claiming that its customers were opposed to unions. Instead, the Respondent has allowed employees to wear union apparel that does not bear the anti-WOW message.

[11] See, e.g., *Escanaba Paper Co.,* above; *USF Red Star, Inc.,* 339 NLRB 389, 391 (2003) (ban on union button applied to facility with no customer contact).

For these same reasons, a partial ban on the shirt limited to times when customers were present would be impractical. *W San Diego,* above, 348 NLRB at 373, cited by the majority, is clearly distinguishable in this regard. There, the Board held that the employer could lawfully prohibit 2-inch union buttons reading "Justice Now! Justicia Ahora!" in public areas of the hotel, but could not similarly prohibit them in areas the public did not access. Here, tour groups accessed most areas of the facility including Shore's work area. As noted, the tours sometimes were unannounced. Under these circumstances, and bearing in mind that employees could wear other union-related apparel at all times, the Respondent has established that a total ban on the anti-WOW T-shirt was justified by the important public image and customer relations interests at stake.

[12] I believe that the majority errs in ordering the Respondent to rescind its dress code based solely on a finding that the dress code was

However, the Board's prior decision found that the Respondent, "in applying the dress code to restrain Section 7 activity, violated Section 8(a)(1) by *maintaining* an overly broad work rule."[13] The court of appeals found no valid explanation for a finding that the dress code's prohibition of "insulting," "confrontational," or "provocative" language was overly broad. *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* above, 701 F.3d at 717–718. The court criticized the Board for its indifference to the concerns that lead employers to adopt rules intended to maintain a civil and decent workplace, and stated that the Board appeared to have abandoned a more sensitive analysis required by *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2003). Id.

My colleagues find it unnecessary to address this issue in their decision today because they find the dress code unlawful *as applied* to Shore in the instant case. Because I do not join them in that finding, I reach the "overly broad" issue addressed by the court and, for the reasons set forth in my dissenting opinion in *William Beaumont Hospital,* 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part), I believe the court's concerns are well-founded. In my view, the prior Board decision incorrectly concluded that the dress code was unlawfully broad and its maintenance violated Section 8(a)(1). Moreover, I believe the *Lutheran Heritage* "reasonably construe" standard, which was applied in the Board's prior decision, constitutes an impermissible interpretation of the Act. Therefore, as I have explained at length in *William Beaumont Hospital,* I believe *Lutheran Heritage* should be overruled.

Under *Lutheran Heritage,* all facially neutral employment policies, work rules, and handbook provisions violate NLRA Section 8(a)(1) if employees would "reasonably construe the language to prohibit Section 7 activity."[14] Under the "reasonably construe" standard, offending work rules are deemed unlawful even though they are facially neutral, i.e., they do not explicitly restrict Section 7 activity, they were not adopted in response to NLRA-protected activity, and they have not been applied to restrict NLRA-protected activity.

The "reasonably construe" standard defies common sense and is contrary to the Act in numerous respects. Although Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the *exercise* of the rights guaranteed in section 7," the disputed dress code in the instant case does not expressly restrict Section 7 activity, was not adopted in response to NLRA-protected activity, and, in my view, was not applied to restrict NLRA-protected activity for the reasons stated above. The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights—even though the risk of intruding on NLRA rights might be "comparatively slight"[15]—without taking into account the many legitimate justifications associated with particular policies, rules and handbook provisions, which may have as their purpose avoiding potentially fatal accidents, reducing the risk of workplace violence, and preventing unlawful harassment. As I explained in *William Beaumont*:

- *Lutheran Heritage* is contrary to Supreme Court precedent establishing that, whenever work requirements are alleged to violate the NLRA, the Board *must* give substantial consideration to the justifications associated with the rule, rather than only considering a rule's potential adverse effect on NLRA rights.[16]

unlawfully applied. There is no valid basis for concluding that the unlawful application of an otherwise lawful rule should make it unlawful to maintain that rule. Similarly, I disagree that rescission is an appropriate remedy when an otherwise lawful rule or policy is unlawfully applied. Instead, in my view, the proper remedy would be an order that the employer cease and desist from applying such a rule in a manner that restricts the exercise of protected employee rights. See *Good Samaritan Medical Center,* 361 NLRB No. 145, slip op. at 4 fn. 14 (2014) (separate opinion of Members Miscimarra and Johnson). But this is not merely my view. *The Board* has adopted this remedy. See *Marina Del Rey Hospital*, 363 NLRB No. 22, slip op. at 2 (2015) ("[T]he Respondent applied its off-duty access rule in a disparate manner, in violation of Section 8(a)(1). We shall therefore order the Respondent to cease and desist from applying its off-duty access policy in a disparate manner that restricts the exercise of Section 7 rights. However, we shall not order the Respondent to rescind the policy because it is facially lawful.") (footnote omitted). My colleagues respond that *Marina Del Rey Hospital* dealt with a different *kind* of rule, and for the kind of rule at issue here, they will order a rescission remedy. In other words, when an employer maintains a facially lawful rule but violates the Act by applying that rule to restrict Sec. 7 activity, then *sometimes* the Board will order the rule rescinded—even though it is facially lawful, and even though the Board in *Marina Del Rey Hospital* relied on that fact to explain why it was *not* ordering rescission of the rule—and *sometimes* it will not order the rule rescinded, depending on what kind of rule it is. This groundless distinction makes no sense whatsoever.

[13] *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB at 171 (footnote omitted; emphasis added).

[14] *Lutheran Heritage*, supra, 343 NLRB at 647. This standard is sometimes called *Lutheran Heritage* "prong one" because, in *Lutheran Heritage*, the "reasonably construe" test is enumerated as the first item, or "prong," in a three-prong standard for determining whether a challenged policy, work rule or handbook provision that does not explicitly restrict Sec. 7 activity is nonetheless unlawful. See *William Beaumont*, supra, slip op. at 7 fn. 3 (Member Miscimarra, concurring in part and dissenting in part).

[15] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967).

[16] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (describing the need to balance the "undisputed right of self-

- *Lutheran Heritage* is contradicted by the NLRB's own cases establishing that numerous work requirements and restrictions are lawful—for example, no-solicitation and no-distribution rules, off-duty employee access rules, "just cause" provisions and attendance requirements—notwithstanding the fact that each would fail the *Lutheran Heritage* "reasonably construe" test.[17]
- The Board has engaged in a balancing of competing interests—in the above cases and others spanning more than six decades—*without* disregarding the justifications associated with particular rules and requirements.[18]
- Under *Lutheran Heritage*, the Board has invalidated many facially neutral work rules merely because they are ambiguous. However, the Board's requirement of linguistic precision when applying *Lutheran Heritage* is contrary to the permissive treatment that Congress, the Board and the courts have afforded to "just cause" provisions, benefit plans, and other employment-related requirements throughout the Act's history.[19] Moreover, given that many ambiguities are inherent in the NLRA itself, it is unreasonable to find that reasonable work requirements violate the NLRA merely because employers cannot discharge the impossible task of anticipating and carving out every possible overlap with some potential NLRA-protected activity.
- The *Lutheran Heritage* "reasonably construe" test stems from several false premises that are contrary to the NLRA, the most important of which is a misguided belief that unless employers formulate written policies, rules and handbooks that can never be construed in a manner that conflicts with some type of hypothetical NLRA protection, employees are best served by not having employment policies, rules and handbooks at all. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.[20]
- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's discretion, contrary to the Board's responsibility to apply the "general provisions of the Act to the complexities of industrial life."[21] It does not permit the Board to afford greater protection to those Section 7 activities that are central to the Act (as compared to other types of activity that may lie at the periphery of the Act or rarely if ever occur), to make reasonable distinctions among different types of justifications underlying particular rules, to differentiate between different industries or work settings, or to take into account discrete events that, if considered, may demonstrate that the justifications for certain work requirements outweigh their potential impact on some type of NLRA-protected activity.[22]
- If a particular work rule exists for important reasons that require the Board to conclude that "the rule on its face is *not* unlawful,"[23] *Lutheran Heritage* fails to recognize that the Board may find that the employer has violated Section 8(a)(1) by *applying* the rule to restrict NLRA-

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organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments," rights that "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," because the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *Great Dane*, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."). See generally *William Beaumont*, supra, slip op. at 11–12 (Member Miscimarra, concurring in part and dissenting in part).

[17] See *William Beaumont*, supra, slip op. at 12 (Member Miscimarra, concurring in part and dissenting in part).

[18] Id., slip op. at 12–13, 20–21 (Member Miscimarra, concurring in part and dissenting in part).

[19] Id., slip op. at 8, 13–14 & fns. 29-31 (Member Miscimarra, concurring in part and dissenting in part).

[20] Id., slip op. at 8, 13–15 (Member Miscimarra, concurring in part and dissenting in part).

[21] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[22] See *William Beaumont*, supra, slip op. at 9, 15 (Member Miscimarra, concurring in part and dissenting in part).

[23] *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (emphasis added).

protected activity.[24] Here as well, *Lutheran Heritage* prevents the Board from discharging its duty to apply the "general provisions of the Act to the complexities of industrial life."[25]

- The *Lutheran Heritage* "reasonably construe" test has been exceptionally difficult to apply, many Board decisions have disregarded important qualifications set forth in *Lutheran Heritage* itself,[26] and *Lutheran Heritage* has consistently produced arbitrary results.[27]

As I stated in *William Beaumont*, our experience with the *Lutheran Heritage* "reasonably construe" standard "has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions."[28] For the above reasons, *Lutheran Heritage* should be overruled by the Board, and if the Board fails to do so, it should be repudiated by the courts.

Consistent with these principles, I believe the Board is required to evaluate the rule at issue in this case by striking a "proper balance" that takes into account (i) the legitimate justifications associated with the disputed rules and (ii) any potential adverse impact on NLRA-protected activity.[29] Applying this standard, I believe that the Respondent's dress code lawfully prohibits "insulting," "confrontational," or "provocative" clothing. Employers have a legitimate interest in promoting a civil and decent workplace. *Lutheran Heritage,* above, 343 NLRB at 649; *Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB,* above, 253 F.3d at 25. The disputed portions of the dress code also serve legitimate interests specific to the Respondent's business. As discussed above, the dress code helps create a positive business image that supports the Respondent's efforts to attract and retain customers. These interests were particularly significant in light of the frequent customer tours conducted by the Respondent, and they were clearly explained to employees in the dress code itself.

By contrast, the impact of the prohibition on Section 7 rights is comparatively slight. Employees remained free to wear clothing that included union insignia, a fact amply demonstrated by the Respondent's offer of such a shirt to Shore at the same time that it requested that he remove the anti-WOW shirt. Nor is there any valid basis to believe that employees would be deterred from engaging in Section 7 activity simply because wearing "insulting," "confrontational," or "provocative" clothing might subject them to discipline. *Lutheran Heritage,* above, 343 NLRB at 648 (prohibition on abusive or profane language would not deter employees from engaging in Section 7 activity). As the court of appeals aptly stated in this case, "provocative and confrontational words . . .

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[24] In *Aroostook County Regional Ophthalmology Center*, supra, the Court of Appeals for the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is attempting to use the rule as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, the rule on its face is not unlawful.

Id.; see also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 10, 28 (D.C. Cir. 2001) (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees"). See *William Beaumont*, supra, slip op. at 19–20 & fn. 60 (Member Miscimarra, concurring in part and dissenting in part).

[25] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266–267. See generally *William Beaumont*, supra, slip op. at 12 (Member Miscimarra, concurring in part and dissenting in part).

[26] See *William Beaumont*, supra, slip op. at 13–14 fn. 29; id., slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[27] Compare *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 (finding it *lawful* to maintain rule prohibiting "abusive or threatening language to anyone on company premises") and *Lutheran Heritage*, 343 NLRB at 646–647 (finding it *lawful* to maintain rule prohibiting "abusive or profane language") with *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding it *unlawful* to maintain rule prohibiting "loud, abusive or foul language"). Also, compare *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (finding it *lawful* to maintain rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees) with *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (finding it *unlawful* to maintain rule prohibiting "false, vicious, profane or malicious statements"), enfd. 203 F.3d 52 (D.C. Cir. 1999). See generally *William Beaumont*, supra, slip op. at 15–18 (Member Miscimarra, concurring in part and dissenting in part).

In part, the arbitrary results associated with application of the *Lutheran Heritage* "reasonably construe" standard have resulted from many Board decisions that have disregarded important qualifications set forth in *Lutheran Heritage* itself. See *William Beaumont*, supra, slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[28] *William Beaumont*, supra, slip op. at 18 (Member Miscimarra, concurring in part and dissenting in part).

[29] See *NLRB v. Great Dane Trailers, Inc*., supra (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"). In performing the balancing discussed in the text, I believe the Board must also take into account other considerations, which may involve, depending on the case, reasonable distinctions between types of rules and justifications, evidence regarding the particular industry or work setting, specific events that may bear on the disputed rule, and the possibility that the rule may be lawfully maintained even though future application of the rule against NLRA-protected conduct may be unlawful. See also *William Beaumont*, supra, slip op. at 15, 18–20 (Member Miscimarra, concurring in part and dissenting in part).

are seldom found in civil and decent places of employment." *Medco Health Solutions of Las Vegas, Inc. v. NLRB,* above, 701 F.3d at 718.

CONCLUSION

The D.C. Circuit remanded this case because it believed that the prior Board decision engaged in a "puzzling" application of the Board's own case law and failed to provide a "reasoned explanation" for the Board's treatment of the evidence.[30] Unfortunately, I do not believe my colleagues have done any better in this second time around. In particular, I do not believe the Board can properly impose a heavier burden on employers seeking to establish reasonable restrictions on workplace apparel for important business purposes; I believe this burden is contradicted by the precedent relied upon by my colleagues; and I believe the majority engages in a selective assessment of the evidence which, when taken as a whole,[31] fails to support their finding of a violation.

For these reasons, I respectfully dissent.

Dated, Washington, D.C. August 27, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from wearing clothing that displays messages that protest working conditions.

WE WILL NOT invite employees to quit their employment in response to their protest of working conditions.

WE WILL NOT maintain overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the overly broad work rules that prohibit employees from wearing clothing with messages that are provocative, insulting, or confrontational, and WE WILL notify employees in writing that we have done so.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules prohibiting employees from registering complaints with clients regarding wages, hours or other conditions of employment and from engaging in solicitation and distribution of literature during off-duty time while in uniform have been rescinded or (2) provide the language of lawful rules; or WE WILL publish and distribute revised handbooks that (1) do not contain the unlawful rules or (2) provide the language of lawful rules.

MEDCOHEALTH SOLUTIONS OF LAS VEGAS, INC.

The Board's decision can be found at https://www.nlrb.gov/case/28-CA-022914 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[30] 701 F.3d at 716–717 (citation omitted).

[31] See Sec. 10(e) of the Act (stating that the Board's factual findings are conclusive "if supported by substantial evidence on the record considered as a whole").